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Supreme Court, U.S.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

BANFF, LTD. f/k/a
SWEATER BEE BY BANFF, LTD.,

Petitioner,

—v.—

SALANT CORP., as successor in interest (by merger)
to both MANHATTAN INDUSTRIES, INC. and
BAYARD SHIRT CORP.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION

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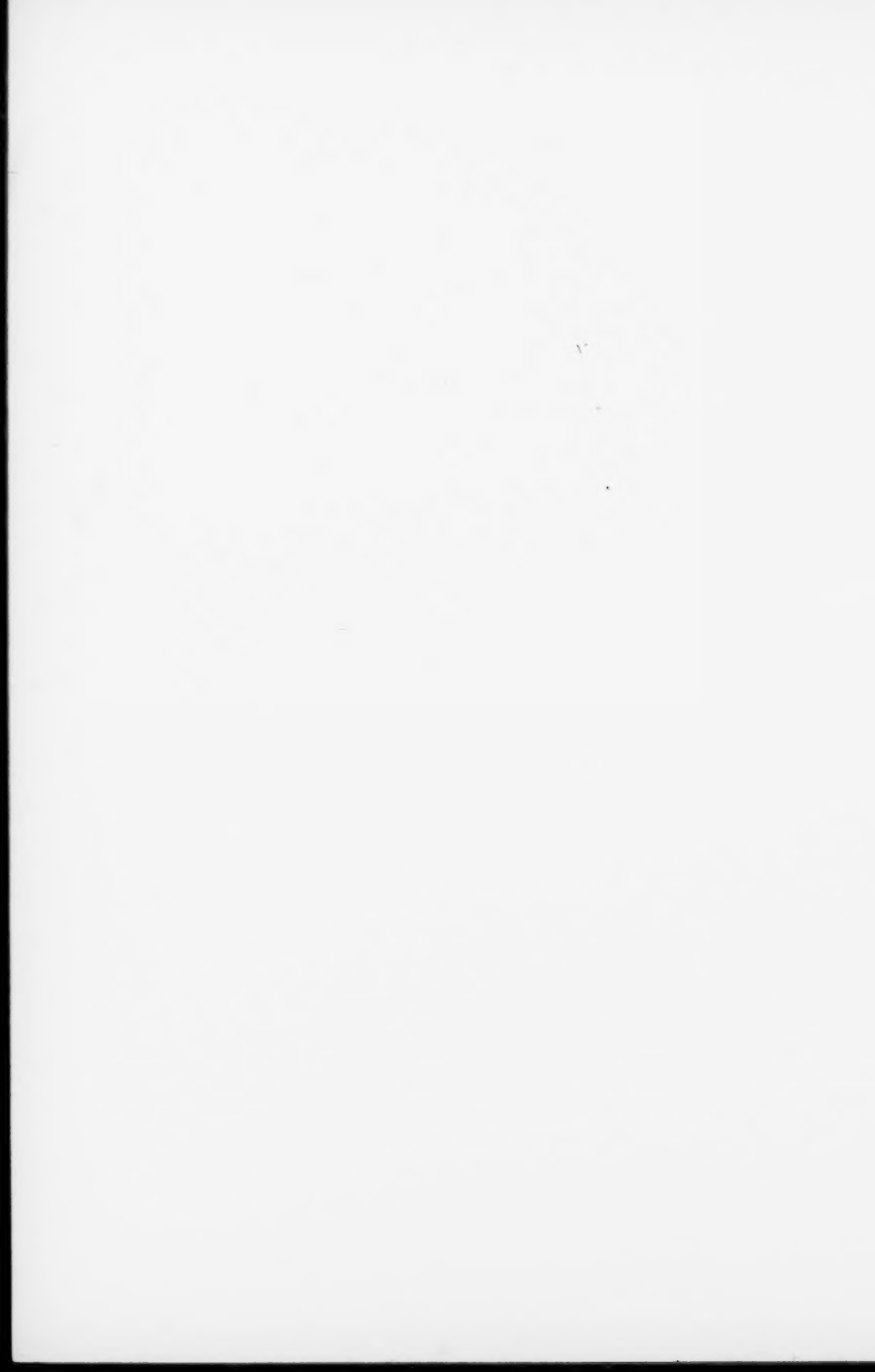
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REPLY IN SUPPORT OF PETITION

The petitioner Banff, Ltd. ("Banff") seeks certiorari to review a \$30,000 discovery fine which the District Court imposed without ever having specified what the alleged discovery violations were. The requirement of specific findings is fundamental and reflects a division among the Circuits.

In this case, the \$30,000 fine was imposed by a special master. The master reported merely in conclusory form that he "essentially agree[d]" with a memorandum filed by the respondent seeking discovery sanctions against the petitioner (A.22,48). The District Court summarily confirmed the master's report (A.21). Neither the master nor the District Court mentioned as much as a single discovery violation.

The large discovery fine below, without specific findings of violation nor specific reasons, ignores the safe-

guards of judicial specificity which are fundamental in practice and required in 4 other Circuits but not in the Second Circuit.

1. Summary of Respondent's Errors

The respondent's errors in opposition are several:

- The respondent erroneously addresses 2 false issues which have nothing to do with the narrow issue raised in the present petition.

- The respondent overlooks the 5 safeguards of specific judicial findings. They are detailed below.

- The respondent erroneously assumes that the cursory judicial recitation of "essential agreement" with a party's argument somehow carries the same safeguards and cognitive assurances as a careful judicial statement of specific findings and reasons.

- The respondent errs in discussing the precedent from 4 other Circuits, all of which require specific judicial findings.

- The respondent erroneously assumes that the Second Circuit's generalized statement of discovery violations below (taken from the respondent's argument) somehow indicates meaningful appellate review.

- The respondent erroneously infers an admission of culpability from the petitioner's decision to raise only a narrow procedural issue here. But the narrow focus here reflects the limits on this Court's certiorari jurisdiction, not an admission of culpability which the petitioner always has disputed.

2. The Two False Issues Raised by the Respondent

At the outset, it is important to note what is *not* at issue here. The respondent addresses 2 false issues:

a. The False Issue of Accusatory Specificity

The respondent raises a false issue by arguing that its accusations allegedly were specific, thereby permitting a specific response. It confuses the alleged specificity of its *accusations* with the requested specificity in judicial *findings*. Pointing to the alleged specificity of its accusations, the respondent argues that “petitioner’s counsel clearly understood specifically what discovery violations he was accused of” (Opp. at 3). This is the wrong focus. The issue is *not* the specificity of the accusations, but the specificity of the *findings*.¹

b. The False Issue of “Apportioning” the Master’s Fees

The respondent raises another false issue by arguing that this case involves a mere “apportionment of a special master’s fees” (Opp. at 8). This is a smokescreen. It is undisputed that the *sole* basis for “apportioning” the master’s fees against the petitioner was the *discovery fine* (Opp. at 1n.1). Without the discovery fine, there would be no “apportionment” of master’s fees in the first place. The discovery fine is the sole issue here.

¹ Many of the respondent’s accusations also were vague and conclusory. For example, the respondent argued that the petitioner “failed to provide full interrogatory responses in a timely fashion” (A.107) *without* specifying which interrogatories it was addressing. Putting aside the respondent’s vague accusation, the petitioner searched the record for all prior interrogatory disputes to show its total compliance (A.63-70).

3. The 5 Safeguards of Specific Judicial Findings

When imposing discovery sanctions, specific judicial findings of violations and reasons are essential. They help to prevent judicial carelessness, deter abuse, expose judicial errors, control the exercise of discretion within prescribed limits, and ensure meaningful appellate review by identifying points of judicial decision and reasoning (Pet. at 11-12). As shown below, the alternative practice adopted by the Second Circuit, in conflict with 4 other Circuits, is not sufficient to protect these interests.

4. A Conclusory Judicial Statement of “Essential Agreement” With A Party’s Argument for Sanctions Does Not Provide The Safeguards of Specific Judicial Findings and Reasons

The respondent defends the Second Circuit’s substitute for judicial specificity: The respondent argues that trial courts may avoid specifying the alleged discovery violations and reasons for sanctions by instead making a conclusory statement of “essential agree[ment]” with a party’s argument (Opp. at 4-7). If this substitute is upheld, District Courts everywhere could avoid specific findings or reasons in discovery sanctions by reciting instead a conclusory “essential agreement” with the party seeking them. This would vitiate the concept of specificity. It also invites several dangers:

a. An Invitation to Judicial Carelessness, Concealment and Haste

The practice approved below invites judicial carelessness and haste. Permitting District Courts to recite “essential agreement” in lieu of specific findings is likely to invite judicial carelessness and excessive reliance

on a party's submissions. Even conscientious judges may be led to err through the expedient of reciting "essential agreement".

The practice approved below also invites judicial concealment. The vague umbrella of "essential agreement" permits District Judges to conceal the use of impermissible factors in imposing discovery sanctions. This danger is particularly acute in contentious cases such as the present. Here the special master imposed a \$30,000 fine against the petitioner who had disputed his fee increase and sought his recusal (Pet. at 8-9). Without specific findings, it is impossible to tell whether the master concealed the use of impermissible factors in levying the \$30,000 fine.

b. The Impossibility of Meaningful Appellate Review

Under the conclusory practice which the Second Circuit approved below, it is impossible to have meaningful appellate review. This is so on 3 levels:

First, it is impossible to tell where the District Court agreed or disagreed with the party seeking sanctions. Unless the District Court agreed with *every* detail in a party's submission (here the respondent's submission was 27-pages long), it is impossible to tell which allegations gained the agreement or disagreement of the District Court. The master's cursory statement of "essential agreement" does not define which arguments or presentations he found "essential" (A.48).

Second, it is impossible to tell whether the District Court erred in adopting *sub silentio* an argument which is not supported in the record. The respondent's 27-page submission is replete with numerous arguments not sup-

ported by the record.² Yet it is impossible to tell whether or how much the District Court relied on these unsupported arguments which are concealed in the master's general statement of "essential agreement" (A.48).

Third, it also is impossible to tell whether the District Court was influenced by impermissible factors. The respondent sought sanctions for numerous legitimate activities.³ It is impossible to tell, from the District Court's conclusory statement of "essential agreement", whether or how much the District Court imposed sanctions for these and other permissible actions.

In these 3 respects, it is impossible to have meaningful appellate review of a trial court's conclusory recitation of "essential agreement" with one party's lengthy argument. This is not an adequate substitute for a careful judicial statement of specific findings and reasons.

i. Without Specific Findings In the District Court, The Second Circuit's Generalized Statement of Discovery Violations Does Not Show Meaningful Appellate Review

The respondent asserts (erroneously) that there was meaningful appellate review because the Second Circuit

2 For example, *compare* the respondent's generalized argument about allegedly untimely and evasive interrogatory answers (A.107) with the petitioner's detailed showing of timely and responsive interrogatory answers (A.63-70). The respondent erred in numerous other respects, including its tales of document delays and its assertion that the petitioner "does not deny" certain alleged failures (A.107)—a blatant falsehood.

3 For example, and without limitation, the respondent's request for sanctions criticized the petitioner Banff for awaiting a formal document request in discovery (A.78), for seeking a stay pending an appeal to the Second Circuit (A.74), and for seeking the master's recusal after his improper attempt to increase his fee (A.80-81; discussed in detail at *pet.* at 8-9). These actions by the petitioner were perfectly legitimate.

recited in general terms that there were document and interrogatory violations (Opp. at 5, quoting A.6-7). But the Second Circuit, apart from the generality of its own statement (A.6-7), could not possibly have reviewed any findings of specific violations: There were none in the master's report (A.48-49) nor District Court's opinion (A.21). The Second Circuit obtained the allegations of violations from the respondent's brief below. There were no findings to review—and thus no indication of any *meaningful* appellate review.

5. The Respondent's Errors in Discussing the Precedent from Other Circuits

At least 4 Circuits require specificity in discovery sanctions and reject the type of conclusory discovery fine which the Second Circuit permitted here (citations at pet. at 11). The respondent's quotations from the other Circuits are not availing. The respondent quotes *Patton v. Aerojet Ordnance Co.*, 765 F.2d 604, 608 (6th Cir. 1985). *Patton* held that the discovery sanction must be "accompanied by some articulation on the record of the court's resolution of the . . . issues presented" (Opp. at 8, quoting 765 F.2d at 608). Yet the only "articulation" here was the master's conclusory statement of "essential agree[ment]" with the respondent (A.48).

Similarly, the respondent quotes *Carlucci v. Piper Aircraft Corp.*, 775 F.2d 1440, 1453 (11th Cir. 1985), and *Wilson v. Volkswagen of America, Inc.*, 561 F.2d 494, 505 (4th Cir. 1977), *cert. denied*, 434 U.S. 1020 (1978). Both *Carlucci* and *Wilson* held that the District Court which imposes sanctions must "clearly state its reasons" (Opp. at 8 n.11, quoting 775 F.2d at 1453 and 561 F.2d at 505). Yet the only "reason" given here was

a summary statement of “essential agreement” with the opposition (A.48). This hardly suffices. Only the Second Circuit permits such a vague conclusory statement to sustain the enormous \$30,000 fine imposed here.

6. The Respondent’s Error in Attributing to the Petitioner an Admission of Violation

The respondent erroneously attributes to the petitioner Banff an admission of discovery violation because the petitioner does not argue its compliance here (Opp. at 6). The respondent is wrong. The petitioner vigorously has argued its compliance below, but has not done so in this Court because of the limits on this Court’s certiorari jurisdiction. The minutiae of discovery compliance (such as whether an individual interrogatory answer is timely or responsive) are hardly worthy of this Court’s certiorari resources. See examples at A.63-70. Rather, the petitioner has reserved for its petition in this Court the fundamental safeguard of specificity—the requirement that District Courts specify the alleged violations and their reasons when imposing large discovery fines (Petition at i).

If this Court grants certiorari and reverses, the petitioner will continue to assert its compliance on remand. Specific findings below would force the District Court to confront the petitioner Banff’s compliance (see, e.g., A.63-70). The respondent errs when it attributes to the petitioner an alleged admission of violation from the fact that the petitioner has not addressed the minutiae of its discovery compliance in this Court whose jurisdiction is limited to broader issues. Sup.Ct.R. 10.1.

7. The Narrow Focus of this Petition Makes It Appropriate for Summary Disposition

The issue is narrow and fundamental. All materials needed to decide it are before this Court. The petition focuses solely on the need for judicial specificity when imposing large discovery fines. The lack of specificity below is apparent from the face of the opinions and master's report, all of which are in the present appendix (A.1-20, 21, 22-49). The respondent also has offered its memoranda below (A.71-101, 102-115) which it claims suffices for judicial specificity (Opp. at 3-4); but *see contra* at pp. 4-7, *supra*. Since all relevant materials are before this Court on a narrow and important issue which has divided the Circuits, the petition is amenable to resolution on the existing papers. The minutiae of compliance can be addressed on remand under a requirement of specificity.

The petitioner respectfully submits that it is appropriate to resolve the present petition on the existing filings.

CONCLUSION

When imposing large discovery fines, judicial specification of the party's violations and the Court's reasons is essential. Judicial specificity prevents abuse and carelessness, ensures the exercise of discretion within permissible limits, and is essential to meaningful appellate review. A master's conclusory statement of "essential agreement" with a request for sanctions does not suffice. It invites judicial carelessness, conceals excesses in discretion, and augurs appellate guesswork in reviewing the discovery fine.

Only the Second Circuit permits such a conclusory discovery fine. Four other Circuits reject it. It should be rejected here in order to ensure uniformity among the Circuits in protecting meaningful appellate review of discovery sanctions, proper consideration of relevant factors in discovery disputes, and the fair administration of the discovery rules.

Dated: February 26, 1990

New York, N.Y.

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